

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

YASER ESAM HAMDI,

ESAM FOUAD HAMDI, As Next
Friend of Yaser Esam Hamdi,

Petitioners,

v.

Civil Action No. 2:02cv439

DONALD RUMSFELD,
Secretary of Defense,

COMMANDER W.R. PAULETTE,
Norfolk Naval Brig,

Respondents.

**RESPONDENTS' MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF
FROM THIS COURT'S PRODUCTION ORDER OF JULY 31, 2002**

Respondents, by and through undersigned counsel, hereby respectfully move for relief from this Court's sua sponte Order of July 31, 2002, directing respondents to generate and produce national-security sensitive materials for the Court's review by noon on August 6, 2002.

BACKGROUND

On July 31, 2002, after receiving "all required submissions in this case," including respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, this Court ordered "a hearing to be held on August 8, 2002, at 2:00 p.m., at which time the Court will hear argument on the materials submitted." July 31 Order at 1. The Court further ordered respondents to produce to the Court by noon on August 6, 2002, "solely for in camera review by the Court," numerous materials listed in the Court's Order "redacted to protect any intelligence matters not within the scope of this inquiry into Hamdi's legal status." *Id.* at 1-2. In particular, the Court

demand respondents to produce, inter alia, “[c]opies of all Hamdi’s statements, and the notes taken from any interviews with Hamdi”; the names and addresses of “all the interrogators who have questioned Hamdi”; “statements by members of the Northern Alliance regarding [Hamdi]”; a chronology of “the date of Hamdi’s capture” and “all the dates and locations of his subsequent detention”; and the name and title of the government official, or officials, who have made certain determinations concerning Hamdi’s detention as an enemy combatant. Ibid.

ARGUMENT

The production demands set forth in this Court’s July 31 Order prematurely place on respondents an intrusive burden that would be unnecessary to resolve this case if the Court grants the government’s pending motion to dismiss. In its recent decision in this case, the Fourth Circuit stated that, “[u]pon remand, the district court must consider the most cautious procedures first, conscious of the prospect that the least drastic procedures may promptly resolve Hamdi’s case and make more intrusive procedures unnecessary.” Hamdi v. Rumsfeld, __ F.3d __, 2002 WL 1483908, at *6 (4th Cir. July 12, 2002) (emphasis added). The court of appeals further emphasized that “[o]ur Constitution’s commitment of the conduct of war to the political branches of American government requires the court’s respect at every step.” Ibid. The Court’s July 31 Order conflicts with those constitutionally compelled guideposts by directing the military to produce sensitive national security information before this Court has even conducted the scheduled hearing on the government’s motion to dismiss the petition on the record now before the Court.

1. In its recent decision in this case, the Fourth Circuit emphasized that “[a]ny standard of inquiry in this case must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation.” Hamdi, 2002 WL 1483908, at *5. The Court’s

July 31 Order, however, places demands on respondents that would be unusual even in the context of ordinary civil litigation between private parties. The Court has requested sua sponte – without any discovery request from petitioners – copies of all statements made by a captured enemy combatant (including statements in interviews conducted solely for intelligence purposes) and the notes taken from any interviews with the combatant; the names and addresses of anyone who has interrogated the combatant; copies of any statements made by the Northern Alliance forces with respect to the combatant; a chronology of the combatant’s whereabouts while under military control; and a listing of the names of government officials who made certain determinations. Those categories of materials implicate sensitive national security matters concerning the conduct of an ongoing war, potential intelligence in the possession of a captured enemy combatant, and decision-making with respect to the appropriate facilities for detaining captured enemy combatants.

Furthermore, the Court’s production order is inconsistent with the highly deferential standard of review that the Fourth Circuit itself already has recognized governs this habeas proceeding. For example, the Fourth Circuit has emphasized that “great deference * * * extends to military designations of individuals as enemy combatants in times of active hostilities,” Hamdi, 2002 WL 1483908, at *3, and that “any judicial inquiry into Hamdi’s status as an alleged enemy combatant must reflect a recognition that government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack,” id. at *5. In addition, the court of appeals has stated that “allowing alleged combatants to call American commanders to account in federal courtrooms would stand the war-making powers of Article I and II on their heads.” Id. at *6. The Court’s production order directly implicates those separation of powers principles and suggests – contrary to the Fourth Circuit’s decision and the legal arguments

set forth in the government's motion to dismiss – that a de novo examination of the military's designation and detention of the enemy combatant at issue would be appropriate.

The Court's July 31 Order (at 1) states that the listed materials are "solely for in camera review," and that they "are to be redacted to protect any intelligence matters not within the scope of this inquiry into Hamdi's legal status." But those provisos do not eliminate the fundamental separation of powers concerns raised by the Court's Order. The court of appeals' recent decision recognizes that "[t]he executive is best prepared to exercise the military judgment attending to the capture of alleged combatants." Hamdi, 2002 WL 1483908, at *5 (emphasis added). Under any constitutionally appropriate standard of review, there would be no need for a court to review the types of materials subject to the Court's Order. Those materials could be needed only for purposes of conducting a de novo review of the military's enemy combatant determination. Likewise, although the Court's Order states that "intelligence matters" should be redacted, the Order qualifies that statement by providing that such redaction is limited to "intelligence matters not within the scope of this inquiry into Hamdi's legal status." The Order thus apparently contemplates that some sensitive intelligence matters will be disclosed to the Court and cannot be redacted.

The Court's Order, coming as it does days before the hearing to consider the government's return, does not accord with the Fourth Circuit's direction to apply "the most cautious procedures first" because they may "make more intrusive procedures unnecessary." Hamdi, 2002 WL 1483908, at *6. Orders calling on the military to generate and produce sensitive intelligence matters concerning the detention of captured enemy combatants are just the sort of intrusive procedures that the Fourth Circuit envisioned may well prove unnecessary when "the most cautious procedures are followed first." And, as explained next, such intrusive discovery is unnecessary in this case.

2. The materials demanded by the Court are not within the proper “scope of this inquiry into Hamdi’s legal status.” July 31 Order at 1. Respondents have filed their response to the habeas petition explaining why the military has determined that Hamdi is an enemy combatant. That return included the declaration of the Special Advisor to the Under Secretary of Defense for Policy, Michael H. Mobbs, who has been substantially involved with the military operations concerning the detention of enemy combatants in connection with the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban). The Mobbs declaration explains the circumstances surrounding Hamdi’s surrender and the military’s determination to detain him as an enemy combatant. As respondents have explained in their motion to dismiss, the government’s return provides all that is necessary to establish as a matter of law that “Hamdi is indeed an ‘enemy combatant’ who was captured during hostilities in Afghanistan,” and that Hamdi’s “present detention” is therefore “lawful.” Hamdi, 2002 WL 1483908, at *5.

Indeed, the Mobbs declaration explains that Hamdi went to Afghanistan to train with and, if necessary, fight for the Taliban; he remained with the Taliban after September 11, 2001, and after the United States military campaign began in Afghanistan; and he was captured when his Taliban unit surrendered to Northern Alliances forces. Mobbs Decl. ¶¶ 3-5, 9. The declaration also explains that in interrogations Hamdi himself has stated that he went to Afghanistan to train with the Taliban and that he turned over his assault rifle to Northern Alliance forces. Id. ¶¶ 5, 9. That declaration more than amply supports the military’s determination that Hamdi is an enemy combatant.

More to the point, under the deferential standard of review applicable in this case, see Hamdi, 2002 WL 1483908, at *5-*6, the military’s determination that Hamdi is an enemy combatant is fully supported by the Mobbs declaration. Under any constitutionally proper standard of review, a court

may at most look to see whether the military has supplied a factual basis to support its own determination that Hamdi is an enemy combatant. See Resps.' Mot. to Dismiss at 16-19. In other words, none of the materials listed in the Court's July 31 Order is within the scope of a proper inquiry into Hamdi's legal status. Indeed, an inspection of the requested materials would all but amount to a de novo review of the military's enemy combatant determination, and thus exceed the limited standard of review governing the Executive determination at issue.

3. Finally, at a minimum, the Court's production order is premature and in tension with the other component of the July 31 Order. In the first part of its Order, the Court scheduled a hearing "on the materials submitted," including the government's motion to dismiss the habeas petition, for August 8, 2002. July 31 Order at 1. But the Court's production order requires the submission of additional materials – some of which, such as the chronology and list of the names and addresses of interrogators, would have to be generated – before that hearing. If the Court is indeed going to conduct a hearing based "on the materials submitted," then there is no need for supplementary materials to be generated and produced before the hearing. Moreover, if the purpose of the hearing is to consider the government's motion to dismiss, then the government should not have to produce materials before the hearing, the very production of which is inconsistent with the legal position that the government has advanced in its papers and will advance at the hearing.

The government's legal position is that its return (including the Mobbs declaration) is sufficient to dispose of this case as a matter of law. Under the fundamental separation of powers principles recognized by the Fourth Circuit and discussed in the government's motion to dismiss, in justifying the detention of captured enemy combatants in war time, the military should not need to supply a court with the raw notes from interviews with a captured enemy combatant, statements

from allied military forces, detailed chronologies of how the military has handled the enemy combatant, or the other types of information listed in this Court's production order. The military has explained in its return why it has determined that Hamdi is an enemy combatant, and provided the Court with a declaration to support that determination. The Court should fully evaluate and resolve the government's legal position at the scheduled hearing, before determining whether any additional materials or briefing are necessary, as a matter of law, to dismiss the petition.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court relieve them from the production requirements of this Court's July 31 Order.

Respectfully submitted,

Paul J. McNulty
United States Attorney

Paul D. Clement
Deputy Solicitor General

By: 

Lawrence R. Leonard
Managing Assistant United States Attorney
World Trade Center, Suite 8000
101 W. Main Street
Norfolk, Virginia 23510
(757) 441-6331

By: 

Gregory G. Garre
Assistant to the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

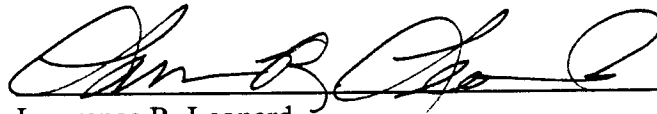
Dated: August 5, 2002

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Respondents' Memorandum in Support of Motion for Relief From this Court's Production Order of July 31, 2002 was served, this 5th day of August, 2002, by hand delivery addressed to:

Larry W. Shelton
Supervisory Assistant Federal Public Defender
Jeremy C. Kamens
Assistant Federal Public Defender
Office of the Federal Public Defender
150 Boush Street, Suite 403
Norfolk, Virginia 23510

A handwritten signature in black ink, appearing to read 'Lawrence R. Leonard', written over a horizontal line.

Lawrence R. Leonard
Managing Assistant United States Attorney